IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 371

In the Matter of the LOS ANGELES COUNTY PIONEER SOCIETY, a Corporation in the Process of Voluntarily Winding Up, *Petitioner and Appellant,*

v.

THE HISTORICAL SOCIETY OF SOUTHERN CALIFORNIA, *Respondent and Appellee.*

THE PEOPLE OF THE STATE OF CALIFORNIA, EDMUND G. BROWN, Attorney General, State of California, *Interveners.*

PETITION FOR REHEARING AND MOTION TO VACATE THE JUDGMENT BELOW AND REMAND THE CASE TO THE CALIFORNIA COURTS.

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

We respectfully petition for rehearing. On the same day as our petition for certiorari was denied this court handed down its decision in *State of Arkansas* v. *State of Texas,* unnumbered original, which involved the question of a

charitable trust. There was an intimation in that opinion that the litigation there involved no federal question, and this court continued the matter to see if it might be adequately resolved in the respective state courts involved. Perhaps this court thought our case should also be resolved by the State of California. It should have been, but it wasn't and Pioneer Society is a citizen of the United States within the meaning of the 14th Amendment and entitled to its protection.

Our case involved the federal question—adequately raised in the California courts,—namely, whether it is due process of law to take $95,263.67 from one *undissolved* society and give it to another. "Legalized larceny" was what one California justice called it in his opinion. A hearing is necessary to determine the truth of that serious charge when it is brought to the attention of this Honorable Court.

The following uncontradicted facts appear from the record:

1. The Los Angeles County Pioneer Society is a voluntary non-profit corporation, organized in 1910 under the laws of the State of California. It has always been law abiding, and has always used the funds for which they were given. They will continue to do so, if given an opportunity.

2. In 1941 one of its members gave $15,000, later an additional $5,000 toward the purchase of a home for her fellow-members, then less than 100. (Exhibit K) A building was bought by the Society, used for a meeting hall as intended, managed at a profit, and its mortgage paid; income tax, state and federal tax were paid on the basis that it is not a charitable corporation. On May 1, 1949 its balance sheet showed that the society then had a value of $102,659.27. Not a dollar had ever been distributed to charity.

3. That year its members sued its president in declaratory relief to determine how it could render charity and what it could do with its funds. The Secretary of State

and his legal adviser, a deputy attorney-general were informed of the litigation, but not "served." They did not then intervene or participate. The superior court judge ruled that Pioneer was not a charitable corporation, but a non-profit corporation, that it could dissolve and distribute its assets pro-rata among its members. This judgment became final. A motion to set it aside was denied. It was never appealed. Pioneer proceeded in accordance with this judge's determination. (This was the sole basis of the charge of abandonment of its trusts.)

4. Pioneer then proceeded to initiate statutory proceedings to dissolve through the court in accordance with the first judge's determination. A different judge was assigned. During the period fixed by law not a single member or anyone else objected. One member asked for an accounting.

5. After the statutory time for objecting elapsed, an attorney representing a rival group, called the Historical Society, appeared before the different judge of the superior court to protest and initiate the proceedings that followed. The attorney-general was persuaded to intervene. He asked that the funds of Pioneer be given to another society —namely, the Historical Society.

6. The second superior court judge obliged.

7. The Supreme Court of California approved, two justices dissenting. One justice referred to the matter as "one of the most outrageous examples of legal larceny" and another referred to it as "contrary to law, justice, reason and constitutional guarantees." Violation of the due process clause of the Fourteenth Amendment in the taking of Pioneer's property were raised on appeal and passed upon by the California courts.

8. Immediately after the second judge held that Pioneer funds were charitable it asked the trial judge and the deputy attorney-general for an opportunity to handle its funds as

charitable, to withdraw its dissolution proceedings, and get back its impounded funds. This offer was refused by the trial judge and attorney-general in an exchange of letters and an oral conference.

9. On January 19, 1953 in accordance with Section 4606 California Corporation Code it formally revoked its resolution to dissolve and duly filed its revocation with the Secretary of State.

10. The California Supreme Court nevertheless thereafter denied its motion to remand the case to the Superior Court to restore its funds to it, although it is undissolved. The dissenting justices of California said this was unconstitutional under the federal constitution.

11. The Supreme Court of the United States is the guardian of the Constitution of the United States.

12. That Constitution declares that no property shall be taken "without due process of law" and without just compensation.

13. The Supreme Court of the United States, in denying certiorari on November 16, 1953 completed the process by which Pioneer's assets approximating almost $100,000 are being taken from it without due process of law and without just compensation and being given to Historical Society unless a rehearing is granted.

It is in violation of the doctrine set out by this court in *Kedroff* v. *St. Nicholas Cathedral*, 97 L. Ed. (adv.) 110 and *Church of Jesus Christ of L.D.S.* v. *U.S.*, 136 U.S. 1, 49.

That doctrine provides that property may be seized ONLY where a charitable corporation is *dissolved* for unlawful practices.

Pioneer has not been and is now not *dissolved*.

It has not engaged in any unlawful practices. As a matter of fact it has sought court direction and court approval of every step.

Neither has there been a failure of charitable purposes, nor an illegality or failure of the object.

In *Church of Jesus Christ of L.D.S.* v. *U. S.* it was pointed out that the State may act as parens patrice *only* where no other person is entrusted with it.

Pioneer Society is still existing with capable trustees who managed their property with great success. Under these facts the state has no right to take Pioneer's property.

Kedroff v. *St. Nicholas Cathedral*, 97 L. Ed. (Adv.) 110.
Church of Jesus Christ L.D.S. v. *U.S.*, 136 U.S. 1, 49.

14. A hearing is necessary to correct this grave injustice to Pioneer, to return its money to it in accordance with the protection of the Constitution of the United States. No statute, or judicial doctrine permits or condones larceny of almost $100,000 or remains silent when it occurs. We should not have had to appeal to this high court to protect Pioneer's money and return it to its rightful owners in accordance with constitutional guarantees. But we are here seeking what was given to us, and what we earned by our efforts, and what has wrongfully been taken from us in violation of due process guaranteed by the 14th Amendment to the U. S. Constitution.

Wherefore, we pray for certiorari, for an order vacating the judgment below, and an order returning Pioneer's funds to it, or remanding the case to the court below with directions.

Respectfully submitted,

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Attorney for Los Angeles County Pioneer Society.

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MOTION TO REMAND CASE TO CALIFORNIA.

Comes now the Los Angeles County Pioneer Society and moves this Honorable Court to vacate the judgment of the Supreme Court of California and remand the case to that court with directions to remand it to the Superior Court of the County of Los Angeles in accordance with Section

4618 of the Corporation Code of California. This motion is based upon the following grounds and facts:

Pioneer Society, following a suit in Declaratory relief between its then president and its members, based upon a decree in that action, believed it had a right to rely on a decree of its superior court and dissolve and distribute its assets totalling $95,263.67 among its members after dissolution. It proceeded to carry on dissolution proceedings under court supervision. An attorney for a rival society, and the attorney-general intervened in these proceedings. A second judge held the money was "charitable funds" and could not be distributed to its members. He further held that by instituting statutory dissolution proceedings in court it had "abandoned" its trust. He made an order taking the funds away, impounding them in a bank, and later made another order turning the money over to the rival society, the Historical Society.

Pioneer Society on January 19, 1953 duly revoked its resolution to dissolve and duly filed its revocation with the secretary of state in accordance with Section 4606 Corporation Code of California.

The Statutory power to take assets, if constitutional, exists only if the corporation is *dissolved* and the funds held in trust, and no trustee to turn them over to. Here the corporation is not dissolved. Its directors are qualified and capable to carry on. Sec. 9801 Corporation Code of California refers only to "dissolved corporations."

Pioneer has revoked its resolution to dissolve. It intends to continue. It has a constitutional right to have its assets returned to it—the taking of which was without due process of law. It has a right to handle its own funds, if charitable, by its own members, who by their business ability enhanced the assets to nearly $100,000.

Section 4618 of the Corporation Code of California requires court supervision of the revocation where proceedings have been commenced under court supervision to dis-

solve. The California Supreme Court denied the motion to remand.

Unless this court grants our motion the judgment of the Supreme Court of California will be final, and this society in violation of due process of law guaranteed by the 14th amendment will be deprived of its valuable assets—although not dissolved. No statutory or constitutional provision permits confiscation or forfeiture in the light of these facts.

This motion is based upon the entire record before this court, our petition for rehearing and this motion.

Respectfully submitted,

MORRIS LAVINE, ESQ.,
Attorney for Los Angeles County Pioneer Society.

POINTS AND AUTHORITIES.

The statutory power under Section 9801, California Corporation Code, to distribute assets exists only if the corporation *is dissolved.* Here there has been no dissolution. The interest to dissolve has been duly revoked and filed. Section 9801, Section 4606, California Corporation Code.

This Court, in a recent case, held that seized property may only be taken when the Charitable Corporation is *dissolved, Kedioff* v. *St. Nicholas Cathedral,* 97 L. Ed. (Adv.) 110, or where there has been a failure of charitable purposes or illegality or failure of its object. None of these exist here.

This is a re-annunciation of the doctrines of the case of *Church of Jesus Christ of L.D.S.,* 136 U.S. 1.

In *L. A. County Pioneer Society* v. *Historical Society,* 257 Pac. (2) 1, Justice Carter said:

> "The record in this case presents one of the most outrageous examples of legalized larceny which has come under my observation. . . .
>
> "Even if Pioneer is a charitable organization (which I am firmly convinced it is not) it has a right to abandon its dissolution proceedings and correct any deviation from its articles of incorporation. To refuse to permit such corrective action is, in my opinion, to deprive Pioneer of its property without due process of law under both the federal and state constitutions."

Justice Schauer:

> "Particularly do I find no justification whatsoever for refusing to permit Pioneer to take the corrective action which it could not know it should take until this court had ruled that it could not rely on the prior final judgment or its charter from the state.
>
> "Pioneer, by its articles of incorporation and the laws of California was not a charitable corporation; it never intended or pretended to be a charitable corporation; it paid taxes as a non-charitable corporation; it was adjudicated not to be a charitable corporation. With that background it instituted a proceeding for dissolution as it had a right to do. Its every act shows the good faith of the fine citizens composing it. Now

this court rules that it is a charitable corporation and in the same judgment punishes Pioneer for instituting the lawful dissolution proceeding by stripping it of its assets and giving them to another; it refuses even to permit Pioneer, despite the authorization of the statute, to discontinue the dissolution proceeding and to carry out the trust which the court adjudges to exist.

"Such action in my view is contrary to fact, to justice, to reason and to constitutional guarantees."

In *Ohio* v. *Neff*, 52 Ohio St. 375, the court said:

> "The results of establishing this doctrine would be to place every eleemosynary corporation within this state, whether religious, educational or created to administer to the wants of the suffering or needy, beyond the limits of constitutional protection."

In *Estate of Hinckley*, 58 Cal. 512, the court, in upholding the doctrine of cy pres, the court only did "so far as the same may be employed in directing the trustees named in a will or deed to carry into effect the general lawful and charitable intent, when the particular scheme is impracticable, or has become unlawful."

Where a society continues in existence and it has trustees to carry the particular object into effect, no power exists to take that property away from it. Such taking is in violation of the federal constitution.

Even the doctrine of cy pres cannot be applied where the donor has given for one particular specific object.

Estate of Hinckley, 58 Cal. 512 says:

> "We entertain no doubt that in the general devolution upon the courts of this state of all judicial power, with respect to charities, is included the power *cy pres*, so far as the same may be employed in directing trustees named in a will or deed to carry into effect the general lawful and charitable intent, when the particular scheme is impracticable, or has become unlawful."

A limitation on the doctrine of cy pres seems to be settled "that where the donor has not expressed his charitable in-

tention generally, but only providing for one specific particular object, and this object cannot be carried out . . . then the court will not execute the trust; it wholly fails."

Gladdy v. *St. Matthews Church*, 25 R. I. 628.
Twentyman v. *Simpson*, 1 Ch. 314.
In re University of London Med. Fund; Fowler v. *Atty.-Gen.*, 2 Ch. 1.
In re Tarrant's Estate, 232 P. (2) 3.
Doyle v. *Whalen*, 87 Me. 414; 31 L. R. A. 118.
Mass.—*Bowder* v. *Brown*, 200 Mass. 269; 86 N. E. 351.
Miss.—*Teele* v. *Bishop of Derry*, 168 Mass. 341.
Rowzee v. *Pierce*, 75 Mass. 846.
Mo.—*St. Louis* v. *McAllister*, 302 Mo. 152.
N. J.—*Roque* v. *Speyer*, 97 N. J. Eq. 447.
Brown v. *Condit*, 70 N. J. Eq. 440.
N. Y.—*Saltsman* v. *Greene*, 136 Miss. 497.
Ohio—*Allen* v. *Bellefontane*, 47 Oh. App. 359.
R. I.—*Smith* v. *Ahern*, 52 R. I. 346.
Tex.—*Woman's Christian Temperance Union* v. *Cooley*, 25 S. W. (2) 171; 74 App. 671, 678.

Gifts to a friendly society, the benefit confined to its own members is not a "charitable trust."

Swift v. *Beneficial Soc.*, 73 Pa. 362.
Spence v. *Widney*, 5 Cal. Unrep. 516.
Mitchell v. *Reeves*, 123 Conn. 549.
Johnson v. *De Paw University*, 116 Ky. 671.
Atty. Gen. v. *Soule*, 28 Mich. 153.
Re Rabin, 316 Mo. 429.
Matter of Shattauch, 193 N. Y. 446.
Re Gay, 138 Cal. 552.

Doctrine of cy pres does not apply:

"Where the charitable purpose is limited to a particular object, or to a particular institution, and no general charitable intent is manifest from the instrument, then if it becomes impossible to carry out the object, or the institution ceases to exist before the gift has taken effect, the doctrine of cy pres does not apply."

Hopkins v. *Grinshaw*, 165 U. S. 342; 41 L. Ed. 739.
Chicago Daily News Fresh Air Fund v. *Kerner*, 305 Ill. App. 237.

Peo. ex rel Smith v. *Braucher,* 258 Ill. 604; 47 L. R. A. (N. S.) 1015.
Carlisle Co. v. *Norris,* 200 Ky. 338.
Bancroft v. *Maine State Sanatorium Assn.,* 119 Me. 56.
Gilmer v. *Bennett,* 116 Me. 382; L. R. A. 1918a 794.

Unless jurisdiction is conferred by statute courts of equity have no jurisdiction to decree a dissolution of a corporation, or to declare a forfeiture of its charter.

Neill v. *Hill,* 16 Cal. 145; 76 An. Dec. 508.
Delaney Products & Ref. Co. v. *Crystal Petroleum Products Corp.,* 88 Cal. Ap. 784, 264, Pac. 521.
In re Holly v. *Bond & Mortgage Co.,* 51 F. (2) 255.
In re Clinton Co., 288 Fed. 829.
Conken v. *U. S. Shipbuilding Co.,* 140 Fed. 219.

Statute on dissolution is a contract between society v. state. See

Fletcher Corp., Vol. 16, p. 9, 726—Secs. 8006, 8007.
Wilan v. *Proprietors of Central Bardee,* 9 R. S. 590.

Hence until the Supreme Court of California finally held Pioneer contrary to the foregoing cases (and its statute on dissolution) to be a charitable corporation and its gifts "Charitable", it acted at all times in accordance with law and good faith and now has the right—since it is not dissolved—to the return of its funds and the carrying out of the wishes of the donor that it be Pioneer's to use and administer.

Respectfully submitted,

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Attorney for Los Angeles County Pioneer Society.

APPENDIX.

Statutes Involved.

California Corporation Code, Section 9800.

"9800. A non-profit corporation may dispose of all or substantially all of its assets, or may be wound up or dissolved, or both, in the same manner and with the same effect as a stock corporation, under the General Corporation Law."

Corporation Code, Section 9801.

"9801. Upon dissolution or winding up of a non-profit corporation, after paying or adequately providing for the debts and obligations of the corporation, the directors or persons in charge of liquidation shall divide any remaining assets among the members in accordance with their respective rights therein, or dispose of them in such other manner as may be provided in the articles unless the corporation holds its assets on any trust.

If the corporation holds its assets on trust, the assets shall be disposed of in such manner as may be directed by decree of the superior court of the county in which the dissolved corporation had its principal office, upon petition therefor by the Attorney General or any person concerned in the liquidation.

This section does not apply where the charter of an incorporated subordinate body is surrendered to, taken away, or revoked by the head or national body."

. . .

"4606. A voluntary election to wind up and dissolve may be revoked prior to distribution of any assets by the vote or written consent of shareholders or members representing no less than a majority of the voting power, or by resolution of the board of directors if the election was by the directors pursuant to Section 4601. Thereupon a certificate evidencing the revocation shall be subscribed, verified and filed in the manner prescribed by Section 4603.

The certificate shall set forth:

(a) That the corporation has revoked its election to wind up and dissolve.

(b) That no assets have been distributed pursuant to the election.

(c) If the revocation was made by the vote or written consent of shareholders or members, the number of shares or memberships voting for or consenting to the revocation and the total number of outstanding shares or memberships the holders of which were entitled to vote on or consent to the revocation.

(d) If the election and revocation was by resolution of the board of directors it shall be so stated."

. . .

"4618. The jurisdiction of the court includes the revocation of the election to wind up and dissolve by the shareholders, and the making of orders for the withdrawal and termination of proceedings to wind up and dissolve, subject to conditions for the protection of shareholders and creditors."

Certificate of Counsel.

Morris Lavine, Esq., counsel for the Los Angeles County Pioneer Society, hereby certifies that this petition is filed in good faith and not for the purposes of delay and that it is based on substantial matters occurring since the filing of the petition for certiorari and a motion not previously presented and is restricted to those grounds.

MORRIS LAVINE.